IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 267 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BHARGAVKUMAR PRANSHANKAR SHUKLA

Versus

CHHAYABEN BHARGAVKUMAR SHUKLA

Appearance:

1. First Appeal No. 267 of 1999

MR CJ VIN for Petitioner No. 1

MR PR NANAVATY with Mr.V.M.Pancholi for Respondent No. 1

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 21/10/2002

C.A.V. JUDGEMENT

1. Bhargavkumar Pranshanker Shukla, appellant original petitioner has filed this appeal under provisions of Sec.28 of the Hindu Marriage Act, 1955,

against the judgment and decree dated 6th November, 1998, passed by the learned Judge, City Civil Court, Court No.12, Ahmedabad, in Hindu Marriage Petition No.262 of 1992. The learned Judge by his impugned judgment pleased to dismiss the said petition of divorce filed by petitioner-husband in this behalf.

2. The facts giving rise to this petition are as under:-

2.1 Marriage of between Bhargavkumar Pranshanker Shukla - appellant husband (original petitioner) and Chhayaben Bhargavkumar Shukla - respondent wife (original opponent) was solemnised on 30th January, 1982, as per Hindu Rites at Ahmedabad. The opponent-wife gave birth to a female child in December 1982 whose name is "Vacha".

2.2 It appears that there was some difference and dispute between petitioner-husband and respondent-wife. They have also some difference and dispute between respondent-wife and her father-in-law and mother-in-law at the matrimonial home. It appears from the record that the opponent wife did not like to stay with the father-in-law and mother-in-law in a joint family. In view of the same, petitioner-husband took a new house somewhere in February 1984 and decided to live separately from his parents.

2.2(A) Somewhere in March 1984 petitioner's younger brother was going to America and at that time it was decided that all family members excepting the parties to this proceedings should go to Bombay to give send off and parties to this proceedings should only go to Ahmedabad Railway Station for the same. At the relevant time, the opponent wife had insisted that the petitioner must not go to Ahmedabad Railway Station also. In view of the same, there was a quarrel between petitioner husband and respondent-wife and the respondent had thrown tripoy or small table against the petitioner in this behalf. The fact which is emerged from the record that both the petitioner and the opponent did not went to railway station to send off the younger brother of the petitioner.

2.3 In view of the aforesaid circumstances, petitioner decided to go to Bombay to give send off by Air, the respondent had threatened not to go or else she would sprinkle kerosene on her body. In view of the aforesaid threat, the petitioner had to take the opponent in auto-rickshaw to her parent's house to place her there. Thereafter he locked the house and went to

Bombay. After husband left for Bombay wife went to the house of husband and took some clothes and ornaments from that house. However, after husband came from Bombay, from the record it appears that the wife has not returned to her matrimonial home despite the husband has made several efforts in this behalf.

2.4 From the record, it appears that, since March 1984 the relation between petitioner and opponent was not cordial. The husband made several efforts to see that both opponent and her daughter return to matrimonial home.

2.5 The petitioner had also addressed a notice dated 25th May 1986 (Exh.45) which was received by opponent on 31st May 1986 in which also all the facts were stated and also indicated that if wife will not return the matrimonial home the petitioner will entitle to file appropriate proceedings. The wife also filed reply on 6th June 1986 (Exh.47) denying the contentions raised by the petitioner in this behalf. The wife specifically stated that after March 1984 her husband has not made an effort to bring her at her matrimonial home and therefore the claims lies with the petitioner husband. The petitioner also gave another notice dated 19th September 1986 in this behalf (Exh.48).

2.6 Ultimately, on August 1992 the applicant-husband filed present Hindu Marriage Petition No.262/92 before the City Civil Court at Ahmedabad for obtaining divorce against the opponent. In the said application all the facts which I have narrated earlier in paras 2.2, 2.2(A), 2.3, 2.4 & 2.5 are stated. I, therefore, did not repeat the contents of the petition to the said extent. In the petition it has been specifically stated as regards incidence regarding March 1984 when brother of the applicant was going abroad there was difference and dispute as opponent did not allow the applicant to go to station to give send off to his brother. A quarrel took place on that day and ultimately at late night the applicant decided to go to Bombay by early next morning by Plane and at that time the applicant took opponent in rickshaw and put her at her parents house. It was stated that during the absence when he was Bombay the opponent came to her matrimonial home and took all clothes, ornaments, fixed deposit receipts, utensils and cash and all other documents and also daughter's clothes and ornaments and went to her parent's house. After the applicant returned from Bombay the applicant went to opponent's house and requested her to come back to the matrimonial home, however, the opponent wife refused to

come to the matrimonial home in this behalf.

2.6(A) It was therefore stated that right from March 1984 the opponent has not stayed with her husband at the matrimonial home though husband has made numerous efforts himself and also through his family members. However, without any reasonable cause, the opponent wife has abandoned the applicant for a continuous period of not less than two years immediately proceeding the presentation of the present petition. In fact, in this case, the petition has been filed in 1990 and the opponent has left the matrimonial home right from 1984. To that extent the applicant is deprived of his happiness of matrimonial home in absence of opponent since 1984. The opponent has also treated the applicant physical as well as mental cruelty due to the long absence from the matrimonial home. In fact the opponent did not allow the applicant to see his daughter also and instigated to his daughter not to see his father in this behalf. In view of the same the opponent has also tried to behave with physical as well as mental cruelty on the applicant in this behalf and, therefore, the total repudiation of marital obligation. It was stated that in view of the fact that the respondent wife's insistence of not leaving the job and to join her matrimonial home amounts to desertion and the appellant husband is entitled for a decree of divorce both on the ground of cruelty as well as desertion namely Sec.13(1)(a) and 13(1)(b) of the Hindu Marriage Act. It has been further stated that in this case marriage took place on 30th January, 1982, and since March 1984 both husband and wife have stayed separately and despite several attempts by relatives and well wishers no conciliation between them was possible. The petition for the dissolution of the marriage was filed in the year 1992 and stated that no co-habitation took place between applicant and opponent and therefore the applicant is entitled for decree of divorce in this behalf.

2.7 The opponent wife has filed a reply to the said marriage petition filed by the husband. The opponent stated that her husband and their relatives were not keeping good relation with the wife. She had denied all the contentions raised by petitioner. According to him, petitioner had no good nature and he was always suspicious in nature and because of that the marriage life of the petitioner and opponent has been ruined. According to him the petitioner had also sometime imbalance mind and had suspicion in nature and create mental cruelty. She has denied the incidence regarding petitioner's younger brother going to America. She has

also denied that she has not stated that her husband should not to go to railway station. According to her, after petitioner returned from Bombay, he has never called him to stay in her matrimonial home. According to her she has not deserted her matrimonial home but petitioner has not co-operated and called her to stay at matrimonial home from March 1984 till filing of the petition.

2.8 Both the parties led documentary evidence as well as oral evidence before the trial Court.

3. On behalf of the petitioner husband, evidence has been recorded at Exh.44. He has narrated certain incidence regarding difference and dispute between husband and wife which I have narrated while describing the petition. Regarding petitioner's younger brother Pranavbhai going to America the petitioner categorically stated that his wife has specifically directed him not to go to railway station and therefore there was some difference and dispute arises and ultimately he took the wife to her parent's house because she gave certain threat in this behalf. He has also indicated that he has made an efforts and persuaded the opponent to come to matrimonial home but she refused to the same. He has also addressed a notice and correspondence which he has also narrated in this behalf. He has also stated that opponent was also serving in a Government undertaking and getting salary to the tune of Rs.3000/- per month. He has also admitted that a female child born in December 1982 out of their wedlock. According to him, the wife was also using filthy language against him. He has also stated that since March 1984 the wife has not returned to the matrimonial home.

3.1 The petitioner has also examined Harenbhai Pandya, brother of the wife. It was stated that his daughter had performed Arngetral and in that the name of her mother was mentioned but the petitioner name though being a father was not mentioned. Even the invitation card was not given to him. He was examined at Exh.64.

3.1(A) The petitioner also examined one Nishaben Dave, who happened to be neighbor of the petitioner. She had gone to petitioner's house on the day when younger brother of petitioner was going to USA. She has also confirmed that on that day there was some difference and dispute between husband and wife to send off the petitioner's younger brother. She has been examined at Exh.67.

4. The opponent was examined at Exh.69. She has also stated that because of suspicious nature of the petitioner-husband, she had no cordial relation with him. She has also stated that because of holidays on Saturday and Sunday when she was going to her parent's house, the husband did not like the same. According to her she stated that when the younger brother of the petitioner went to America and because of that the petitioner desired to go alone to Bombay and therefore there was some difference and dispute arises between them. According to her after 1984 husband put the wife to her parent's house and thereafter he has not called her to stay at matrimonial home. She stated that now her daughter became 15 years old at relevant time and she was studying in 10th Standard. She has stated that she has no desire to give divorce to the petitioner in this behalf.

5. The learned trial Judge thereafter considered the entire evidence on record and framed issues at Exh.31. The learned trial Judge after considering the documentary evidence and oral evidence came to the conclusion that (1) petitioner failed to prove that opponent has deserted him for a continuous period of not less than two years immediately preceding the presentation of the petition, (2) petitioner husband failed to prove that the opponent-wife has after the solemnization of marriage, treated him with cruelty as averred in petition. The learned trial Judge has held that opponent proved that petitioner has treated her with cruelty after the solemnization of their marriage as contended by her in her reply at Exh.5. In view of the same the learned trial Judge has held that plaintiff is not entitled to decree of divorce as prayed for in the petition in this behalf.

6. It may be noted that before this matter heard I also called the parties in chamber both husband and wife trying to settle the matter amicably. However, both the parties expressed their desire not to settle the matter out of Court and that is how I have heard the matter on the merits of the case.

6.1 Mr.C.J.Vin, learned counsel for the appellant has also stated that in view of the fact that since 1984 both husband and wife have not stayed together when the petition was filed in 1992 and evenafter petition was dismissed also by the trial court on 6th December, 1988. Thereafter the present appeal has been filed by the husband in January 1999 and since January 1999 till today both the petitioner husband and respondent wife did not

live together. He, therefore, submitted that in view of this peculiar facts and circumstances of the case, the petitioner-husband is entitled to a divorce on the ground of desertion and cruelty.

6.1(A) The learned advocate for the appellant has submitted that though in the petition the ground of cruelty and desertion are mentioned he mainly relies upon the ground of desertion at the time of hearing of this appeal.

6.1(B) Learned counsel for the appellant has relied upon provisions of Hindu Marriage Act, 1955 particularly Sec.9 of the Act which provides restitution of conjugal rights. Sec.10 of the Act provides judicial separation. Sec.13 of the Act provides for divorce which reads as under:

"Sec.13 Divorce:- (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party -

(ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition.

Explanation regarding desertion.

"Explanation :- In this sub-section the expression 'desertion' means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.

6.1(C) The learned advocate for the appellant husband relied on the judgment of the Hon'ble Supreme Court in the case of ADHYATMA BHATTAR ALWAR Vs. ADHYTMA BHATTAR SRI DEVI reported in (2001) AIR SCW = AIR 2002 SC 88.

6.1(D) In Adhyatma Bhattar Alwar Vs. Adhyatma Bhattar Sri Devi (supra) the facts were that the appellant

Adhyatma Bhattar Alwar and the respondent Adhyatma Bhattar Sri Devi were married on 22nd August, 1978 in Nalamvari Choultry at Rajamundry. The couple stayed together in village Palacole where the parents of the husband reside. A female child was born to them on 12th December, 1979 whereafter they separated. The wife and the daughter lived with her parents at Rajamundhry, while the husband continued to stay with his parents at Palacole. The husband filed a petition for dissolving the marriage under Section 13 of the Hindu Marriage Act, 1955 praying for a decree for divorce on the ground stated in sub-clause (ib) of sub-section (1). In the petition it was alleged that the father of the respondent wife had taken her to Rajamundhry for delivery and also stating that her mother was not well. After the birth of the child, since the respondent did not return to Palacole, the appellant, his father and other relatives made attempts to persuade the respondent's father to send his daughter to Palacole. The attempt did not bear fruit as the respondent was insistent that the appellant should live separately from his parents in a separate house. Since the condition was not acceptable to the appellant, she refused to join him at Palacole. On 23rd May, 1981, the appellant went to Rajamundhry to bring the respondent but she was not sent and the appellant was informed that the respondent would be sent only after he got a job. As the appellant could not be able to get a job, the respondent wife did not join matrimonial home and all attempts to persuade the respondent to come and live with him failed. The appellant therefore filed the petition for divorce on the ground of desertion by the wife for a period of more than two years.

6.1(E) The respondent wife contested the said petition before the Trial Court. The Trial Court held that the appellant had satisfactorily proved that the respondent was guilty of having deserted him for a continuous period of more than two years preceding the filing of the petition for divorce and that he was entitled to a decree for judicial separation under Section 10 of the Act instead of decree for dissolution of marriage under Section 13(1)(ib) of the Act.

6.1(F) Being aggrieved and dissatisfied with the judgment of the Trial Court, both the appellant and the respondent filed appeal before the High Court of Andhra Pradesh. The High Court of Andhra Pradesh set aside the judgment and decree of the trial court, allowed the appeal filed by the respondent wife and dismissed the appeal filed by the appellant husband. The High Court held that the wife did not have at any time the necessary

animus to put an end to the matrimonial relationship and never intended to desert her husband. In view of the same, Special Leave Petition was filed before the Hon'ble Supreme Court.

6.1(G) In ADHYATMA BHATTAR ALWAR's case (supra) at para 6 on page no.91 the Hon'ble Supreme Court has observed thus:

> "The clause lays down the rule that desertion to amount to a matrimonial offence must be for a continuous period of not less than two years immediately preceding the presentation of the petition.This clause has to be read with the Explanation.The Explanation has widened the definition of desertion to include 'wilful neglect' of the petitioning spouse by the respondent. It states that to amount to a matrimonial offence desertion must be without reasonable cause and without the consent or against the wish of the petitioner. From the Explanation it is abundantly clear that the legislature intended to give to the expression a wide import which includes wilful neglect of the petitioner by the other party to the marriage. therefore, for the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly, no elements are essential so far as the deserted spouse is concerned; (1) absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively and their continuance throughout the statutory period."

6.1(H) Thereafter, the Hon'ble Supreme Court has, after considering its judgments in the case of BIPIN CHANDER JAINSINGHBHAI SHAH Vs. PRABHAWATI reported in AIR 1957 SC 176; LACHMAN UTAMCHAND KIRPALANI Vs. MEENA reported in AIR 1964 SC 40, ROHINI KUMARI VS. NARENDRA SINGH reported in AIR 1972 SC 459, SANAT KUMAR AGARWAL VS. NANDINI AGARWAL reported in AIR 1990 SC 594, and also CHETAN DASS VS. KAMLA DEVI reported in AIR 2001 SC 1709, in para 12 on pages 94-95, observed as under:

"Para 12 - Coming to the case at hand, it is revealed from the evidence on record, as discussed in the judgments of the Trial Court and the High Court that the respondent wife had gone to her parents' house for birth of the child, which apparently cannot be construed as an expression of her desire to forsake her husband permanently; but after the birth of her child when attempts were made by the husband appellant, his parents and relations, she had laid down a condition that the appellant should live in a separate house from his parents taking the plea that her father in law had attempted to molest her, which explanation she signally failed to establish. In the meantime, father of the appellant expired some time in 1988, putting an end to the so-called reason of misbehavior of her father-in-law. There is nothing on record that thereafter she expressed her desire to join her husband at the matrimonial home. It is relevant to state here that the appellant is the only son of his parents and as expected, he was not willing to establish a separate residence leaving his parents to live alone in their old age. The cumumlative effect of the circumstances and the conduct of the respondent is that she had given expression of animus deserendi. Thus, the two ingredients of the matrimonial offence of desertion i.e. separation in fact and animus deserendi have been established by the appellant. The learned trial Judge, having regard to the facts and circumstances of the case, was right in recording the finding that the husband had successfully established the case of desertion by the wife and exercising the discretion vested under Section 13A of the Act, the learned trial judge had granted the decree of judicial separation instead of divorce.

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The failure on the part of the wife to substantiate a serious allegation of infamous conduct of indecent advances said to have been made to her by the father-in-law, taken together with the absence and omission from her side to demonstrate her readiness and willingness to discharge her continuing obligation to return to the matrimonial home, establish sufficiently the animus deserendi, necessary to prove legal desertion as required under section 13(1)(b).

> The conduct of the wife seems to be more indicative of a firm determination not to return to the matrimonial home and discharge the obligations attendant thereto. Therefore, the judgment of the High Court is unsustainable and has to be set aside."

6.1(I) The Hon'ble Supreme Court has allowed the appeal and set aside the judgment of the High Court of Andhra Pradesh and the judgment of the trial court was restored.

6.2 The learned counsel for the appellant has relied on another judgment of the Hon'ble Apex Court in the case of G.V.N. Kameswara Rao Vs. G.Jabilli reported in 2002 AIR SCW 162. In that case G.V.N. Kameswara Rao - the appellant husband is a double doctorate holder one in Mathematics from Andhra University and another from U.S.A. and had been working in United States during the relevant period. The respondent, G.Jabilli, is a post-graduate in Home Science and was working as a lecturer in the year 1979. The marriage between two was solemnised on 30.7.1979. After the marriage, the appellant and respondent stayed together for some period and thereafter the appellant left India for United States. The respondent was asked to join him after having obtained the vise and completing other formalities. The respondent, after a period of six months, joined the appellant in United States. It appears that the marital life of the appellant and the respondent ran into rough weather from the very beginning of their stay in United States. A daughter, Sandhya, was born to them, on 10.6.1981. In 1982, the appellant, respondent and their daughter Sandhya came to India but the appellant returned to United States in November, 1982 and the respondent joined him only in April, 1983. In January, 1985, the respondent along with her daughter returned to India and it seems that the misunderstanding between the parties deepened and ultimately the appellant filed application for divorce under Section 13 of the Hindu Marriage Act, 1955 alleging that after the solemnization of their marriage, the respondent treated the appellant with cruelty. In view of the said circumstances, the Family Court, after assessing the merits of the matter, held that the appellant husband was entitled to get a decree for dissolution of marriage.

6.3 Being aggrieved and dissatisfied with the said order, the respondent wife filed appeal before the Division Bench of the High Court of Andhra Pradesh and the Division Bench of the High Court reversed the decision of the Family Court holding that the appellant

was at fault and he had been trying to take advantage of his own wrongs and he was not entitled to get a decree for divorce.

6.4 Being aggrieved and dissatisfied with the aforesaid judgment of the Division Bench of the High Court of Andhra Pradesh, the appellant husband filed appeal before the Hon'ble Apex Court. The Hon'ble Supreme Court after considering the facts of the case, provisions of Hindu Marriage Act and also its judgments in Dr.N.G.Dastane Vs. Mrs. S.Dastane, reported in AIR 1975 SC 1534; S.Hanumantha Rao Vs. S.Ramani, reported in 1999(3) SCC 620; V.Bhagat Vs. D.Bhagat (Mrs.), reported in 1994(1) SCC 337, has held in para 18 thus:

"We do not think that this is a case, where the appellant could be denied relief by invoking Section 23(1)(a) of the Hindu Marriage Act. On the other hand, various incidents brought out in the evidence would show that the relationship between the parties was irretrievably broken, and because of the non-cooperation and the hostile attitude of the respondent, the appellant was subjected to serious traumatic experience which can safely be termed as 'cruelty' coming within the purview of Section 13(1)(ia) of the Hindu Marriage Act. Therefore, we hold that the appellant is entitled to the decree for dissolution of marriage under Section 13(a)(ia) of the Hindu Marriage Act."

6.5 Learned counsel for the appellant has relied upon the judgment of the Hon'ble Apex Court in the case of Praveen Mehta vs. Inderjit Mehta reported in 2002 AIR SCW 2886 that was also a question of mental cruelty. Para 19 on page 2894 and para 24 on page 2895 reads as under:

"Para.19 Clause (ia) of sub-section (1) of S.13 of the Act is comprehensive enough to include cases of physical as also mental cruelty. It was formerly thought that actual physical harm or reasonable apprehension of it was the prime ingredient of this matrimonial offence. That doctrine is now repudicated and the modern view has been that mental cruelty can cause even more grievous injury and create in the mind of the injured spouse reazonable apprehension that it will be harmful or unsafe to live with the other party. The principle that cruelty may be inferred from the whole facts and matrimonial

relations of the parties and interaction in their daily life disclosed by the evidence is of greater cogency in cases falling under the head of mental cruelty. Thus mental cruelty has to be established from the facts. (Mulla Hindu Law, 17th Edition, Volume II, page 91).

"Para.24 As noted earlier the parties were married on 6th December, 1985. They stayed together for a short period till 28th April, 1986 when they parted company. Despite several attempts by relatives and well wishers no conciliation between them was possible. The petition for the dissolution of the marriage was filed in the year 1996. In the meantime so many years have elapsed since the spouses parted company. In these circumstances it can be reasonably inferred that the marriage between the parties has broken down irretrievably without any fault on the part of the respondent. Further the respondent has remarried in the year 2000. On this ground also the decision of the High Court in favour of the respondent's prayer for dissolution of the marriage should not be disturbed. Accordingly this appeal fails and is dismissed. There will, however, be no order for costs."

6.6 Learned advocate for the appellant has relied upon the decision of the Supreme Court in the case of Sanat Kumar Agarwal V. Smt. Nandini Agarwal, reported in AIR 1990 954. (Para 5)

"Para - 5 : It is well settled that the question of desertion is a matter of interference to be drawn from the facts and circumstances of each case and those facts have to be viewed as to the purpose which is revealed by those facts or by conduct and expression of intention, both interior and subsequent to the actual act of separation.

6.7 The learned counsel for the appellant husband has relied on Halsbury's Law of England, Fourth Edition, 13 Volume, Page 284, para 575 where desertion has been defined thus:

"Para 575 - Desertion as proof of irretrievable breakdown of marriage - The court may find that a marriage has broken down irretrievably if the petitioner satisfies (see para 583) the court

that the respondent has deserted the petitioner for a continuous period (see para 578) of at least two years immediately preceding the presentation of the petition (see Matrimonial Causes Act, 1973 s. I(2)(c)).

Para 576 - Meaning of desertion - In its essence desertion (see: Perry Vs.Perry (1952) P. 203 at 210, 211 / (1952) I AIR ER 1076 at 1079, C.A.) means the intentional permanent forsaking and abandonment (see Hopes Vs. Hopes (1949) p.227 at 235) of one spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the court has discouraged attempts at defining desertion, there being no general principle applicable to all cases.

Desertion is not the withdrawal from a place but from a state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, 'the home'. There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated.

The person who actually withdraws from cohabitation is not necessarily the deserting party. The fact that a husband makes an allowance to a wife whom he has abandoned is not answer to a charge of desertion."

Further in para 582 it is further observed thus:

"Elements of desertion; factum and animus. - For desertion to exist there must be both the factum, or physical separation, and the animus deserendi, or the intention to desert in the sense of bringing cohabitation to an end."

6.8 In Rayden on Divorce, Eight edition, paragraph 124 on page 165 it is observed thus:

"Elements of desertion: factum and animus - For the offence of desertion there must be two elements present on the side of the deserting spouse, namely the factum, i.e. the physical separation and the animus deserendi i.e. the

> intention to bring cohabitation permanently to an end (see: 3 All E.R. 825) and two elements present on the side of the deserted spouse , namely absence of consent (see: All E.R. 437) and absence of conduct reasonably causing the deserting spouse to form his intention to bring cohabitation to an end (see: 2 All E.R. 331). Desertion is a question of fact (see: 2 Q.B. 418) and so is the continuance of desertion (see: (1939) (3 All E.R. 437, 442),though it is a question of law whether any particular conduct is reasonably capable of having the necessary deserting or expulsive meaning; desertion may be inferred from certain acts in one case which is another would not justify the same inference; the acts draw their significance from the purpose with which they are done as revealed by conduct or other expressions of intention. If a state of separation de facto exists during the relevant period, the primary question is whether or not that separation is attributable to an animus deserendi on the part of the respondent."

6.9 He has relied on Mulla Hindu Law, 16th Edition, at para 442 on page 487 regarding marital duties which means the wife is bound to live with her husband and to submit herself to his authority.

6.10 So far as desertion is concerned, learned counsel for the appellant has relied upon the judgment of this Court in Second Appeal No.20 of 2000 decided on 22.1.2002 in the case of Jagdish Mangtani vs. Geeta Jagdish Mangtani.

6.11 The facts of that case was that husband was residing with his parents at Bombay and wife was staying at Bombay. There was also one baby girl born out of their wedlock and thereafter the wife decided to stay at Bhuj. As the wife was serving as teacher in school earning good income at Bhuj and as husband was earning meagre income, the insistence of the wife was not to leave job at Bhuj and to stay with the husband at Bombay. On the other side the husband contention that he desire that he was not to leave job at Bombay and to stay at Bhuj, his insistence that if wife desire to come at Bombay then he is prepared to stay with him. However the fact emerged that for long time both husband and wife did not reside together and did not fulfil marital obligation in this behalf. In view of that fact there was some dispute between husband and wife, the appellant husband filed a petition for divorce on the ground of desertion

and cruelty.

6.12 The trial court held that husband proved that wife has committed the act of cruelty and husband has also proved that the wife has wilfully abandoned the petitioner. However the appellate court reversed the decree and that is how the husband filed Second Appeal before this Court. In that Second Appeal the question of law formulated by this Court as under:

"Whether the respondent wife's insistence of not leaving job (service) to join her husband's matrimonial home amounts to desertion and whether the appellant husband is entitled for decree of divorce on this ground as provided under Section 13(1)(ib) of the Hindu Marriage Act, 1955?

6.13 In that case, the Court considered the provisions of Hindu Law, judgments of the Hon'ble Supreme Court in the case Adhyatma Bhattar Alwar vs. Adhytma Bhattar Sri Devi reported in (2001) AIR SCW 4641 = AIR 2002 SC 88, G.V.N. Kameswara Rao vs. G.Jabilli reported in 2002 AIR SCW and also Halsbury's Law of England, Fourth Edition, 13 Volume, Page 284, para 575 where desertion has been defined, also Rayden on Divorce, Eight Edition, para 124 on page 165. The court also considered the judgment of the Hon'ble Apex Court in the case of Savitri Pandey vs. Prem Chandra Pandey reported in 2002 AIR SCW 182, also judgment of Hon'ble Apex Court in the case of Chetan Dass vs. Kamla Devi reported in 2001 AIR SCW 1660 and other judgments. In para 14, 14.1, 14.2, 14.5(A) and 14.6 the Court has observed that wife has deserted the husband and ultimately the Court allowed the second appeal and granted decree of divorce.

6.14 Learned advocate for the appellant also stated that in view of this peculiar facts and circumstances of the case which he has stated above after the appellant is not entitled to obtain divorce on the ground of either cruelty or desertion then appellant husband is entitled to divorce on the ground of breakdown of marriage. He submitted that no useful purpose will be served by maintaining a union which has ceased to exist but in name and further no useful purpose will be served in determining at whose fault marriage broke down - may be one of the parties was at fault, may be both were at fault. According to him the marriage is broken down by incompatibility, or may be it has broken down by the irony of circumstances. He submitted that irretrievable breakdown of marriage is not per se a ground of divorce as provided under Sec.13 of the Act. It will only a

version of irretrievable breakdown which constitutes a ground, i.e., non-compliance with decree of Restitution after judicial separation for a period of one year. He submitted that in this case when petition of divorce was filed in the year 1992 since March 1984 the appellant husband and respondent wife have not stayed together. So in this case the husband is entitled for divorce on the ground of desertion and also on the ground of marriage is completely broken down.

6.15 In support of the aforesaid contention, learned advocate for the appellant has relied upon following authorities.

(1) He has relied upon the judgment of the Hon'ble Apex Court in the case of Ms.Jorden Diengdeh vs. S.S.Chopra reported in AIR 1985 SC 935 para 7.

(2) He submitted the 71th Report of the Law Commission of India on the Hindu Marriage Act, 1955, dated April 7, 1978 throw much light on the matter. [Re. the same has been quoted by the Apex Court in the case of Ashok Hurra vs. Rupa Bipin Zaveri reported in AIR 1997 SC 1266 para 23 on page 1273.

(3) Learned counsel for the appellant has also relied upon Mayne's Hindu Law and Usage, 13th Edition page 342.

(4) He has also relied upon Paras Diwan, Modern Hindu Law, 11th Edition 1997 page 66.

(5) He has also relied upon Halsbury's Laws of England, 4th Edition, Volume 13, paras 640, 641 and 642 page 320.

(6) He has also relied upon Matrimonial Causes Act, 1973 by Halsbury's Statutes of England, Third Edition, Volume 43, particularly Section 1 of the Act.

(6A) He has also relied upon the judgment of the Hon'ble Apex Court in the case of Smt.Kanchan Devi Vs. Promod Kumar Mittal and another reported in AIR 1996 SC 3192.

(7) He has also relied upon the judgment of the Hon'ble Apex Court in the case of V.Bhagat vs. Mrs.D.Bhagat reported in AIR 1994 SC 710

particularly para 17 on page 71 and para 23 on page 721.

(8) He has also relied upon the judgment of the Hon'ble Supreme Court in the case of Ashok Hurra vs. Rupa Ashok Hurra reported in AIR 1997 SC 1266 particularly para 21 and 22.

7. Mr. P.R. Nanavati learned advocate for the respondent has stated that in this case admittedly on the date of the incident, as I have stated earlier, in the facts and circumstances of the case earlier in 1984 when difference and disputes arose, the husband took the wife and put her at parents' house and thereafter he has left for Bombay. So, according to the learned advocate for the respondent the wife did not desert the husband on that day. Learned advocate for the respondent further state that right from 1984 till 1992 when the present petition for divorce filed by the husband, the wife was ready and willing to joint matrimonial home. Therefore, there is no actual desertion by the wife from her husband's house. Though there is no doubt that she is staying separately but she had no intention to desert from husband in this behalf. The wife was prepared to resume cohabitation with the husband and express her inclination to resume cohabitation with the husband. Learned advocate for the respondent stated that the trial Court has dismissed the petition for divorce on 6-11-1998 and thereafter the present first appeal has been filed and even during pendency of the first appeal the wife has expressed her desire to join matrimonial home. But in fact the husband has not cooperated in this behalf. Mr. Nanavati learned advocate for the respondent submitted that a baby girl born in December 1982 is 20 years old now and in very near future she will attain marriageable age and if the divorce is granted at this stage, it will not only affect the wife i.e. mother of the said daughter but also the girl in connection with her future prospectus of marriage. In view of the same, learned advocate for the appellant submitted that the appeal filed by the husband should be rejected.

7.1 Mr.P.R.Nanavati, learned counsel for the respondent has relied upon the judgment of the trial court and tried to support the reasonings of the trial court in this behalf. He has also relied upon the evidence of the parties. He has also relied upon the judgment of the Hon'ble Supreme Court in the case of Savitri Pandey vs. Prem Chandra Pandey reported in 2002 AIR SCW 182. In that case the marriage between the appellant wife, Savitri Pandey and the respondent

husband, Prem Chandra Pandey was solemnised on 6.5.1987. The appellant wife lived with the respondent husband till 21.6.1987 and according to her, the marriage between the parties was never consummated. After 21.6.1987, the parties started living separately. There was a demand for certain more articles from the respondent husband which were also subject matter of the petition and ultimately it has been alleged that the respondent husband and his family members were alleged to have started torturing the appellant wife. Aggrieved to the attitude of the respondent husband and his family members, the appellant filed petition under Section 13 of the Act seeking dissolution of marriage by a decree of divorce on the ground of desertion and cruelty along with prayer for the return of the property and grant of permanent alimony. The respondent also filed a petition seeking divorce and grant of other reliefs. However, on 14.5.1996 the respondent filed an application for withdrawal of his matrimonial case which was allowed on 19.5.1996. However, the appellant wife had alleged that the respondent was having illicit relations with a lady residing in Gaya in Bihar with whom he was stated to have solemnised the marriage. The allegations made in the petition were denied by the respondent and it was stated that in fact the appellant-wife was taking advantage of her wrongs.

7.1(A) On the basis of the said pleading, the Family Court concluded that no evidence had been led to prove the allegations of cruelty and desertion. The court, however, held - "but it is proved that the respondent had deserted the petitioner, hence the petitioner will get or is entitled to for a decree of divorce". However, on appreciation of evidence led in the case, the Division Bench of the High Court held thus:

> "We also do not find any evidence that the wife has been treated with cruelty by the husband. We are also of the view that there is no evidence that petitioner is deserted.

7.2 Being aggrieved and dissatisfied with the aforesaid judgment, the wife filed appeal before the Hon'ble Apex Court. It may be noted that during the pendency of the proceedings it has brought on record by the learned counsel for the appellant wife that after decree of divorce the appellant had remarried with one Sudhakar Pandey and out of the second marriage a child is also stated to have been born. That was an additional ground on which decree of divorce was also prayed. The Hon'ble Supreme Court in para 7A on page 187 has observed

as under:

> "Desertion", for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. In other words it is a total repudiation of the obligations of marriage. Desertion is not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawing from the matrimonial obligations, i.e. not permitting or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into consideration the concept of marriage which in law legalises the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in passion to prevent licentiousness and for procreation of children. Desertion is not a single act complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case."

7.3 The Hon'ble Apex Court has also stated that the trial court has given very cogent and convincing reasons dismissing the petition of the husband and this Court may not interfere with the said findings in this behalf.

MY CONCLUSION :

8. I have considered all the submissions in this behalf. I have also considered the judgment of the Hon'ble Supreme Court and also the judgments of this Court in the case of Jagdish Mangtani (supra) in this behalf. In my view the appellant husband is entitled for divorce on the ground of desertion.

8.1 In my view the marriage under the Shastric Hindu Law was a samskara or a sacrament. It being a holy union was indissoluble. The shastras did not accept divorce except in certain communities where it was permitted by custom. Now the Hindu Marriage Act, 1955, recognises divorce. Section 13 of the Act lays down the conditions or grounds under which one spouse can claim divorce against the other. According to the said Section a marriage can be dissolved only if one of the parties to marriage has committed some matrimonial offence recognised as a ground for divorce.

8.2 Desertion per se was not a ground for relief by way of divorce prior to the amendment of this Section by the Amending Act of 1976 but was only a ground for the relief of judicial separation under clause(a) of Section 10(1) which was in identical terms. The essence of desertion is the forsaking and abandonment of one spouse by the other without reasonable cause and without the consent or against the will of the other. Accordingly desertion under the Hindu Law is a withdrawal of a party from the marital home does not by itself constitute desertion by that party. It is the party who by his or her conduct beings cohabitation to an end that is guilty of desertion. (See: Khorshed vs. Muncherji (1937) 39 Bom.L.T. 1141. The essential ingredients of this offence in order that it may furnish a ground for relief are:

(a) the factum of separation; and
(b) the intention to bring cohabitation permanently to an end - animus deserendi

(c) the element of permanence which is a prime condition requires that both these essential ingredients should continue during the entire satisfactory period.

8.3 "Desertion, in short, means a total repudiation of marital obligation. An end to two-in-oneship and to marital togetherness which is the kernel of marriage. To explain it with an analogy: most of us are familiar with the term desertion deserter from the army. A deserter from the army is one who runs away from his post or from his duty. A spouse is in desertion if it runs away from his marital obligations, from cohabitation. The "running away" may mean that he actually leaves the matrimonial home permanently or living in matrimonial home refuses to perform marital obligations; he ceases to cohabit or he abandons his matrimonial obligations. The latter aspect of desertion is termed as constructive desertion. Thus desertion may be classified under the following heads:-

(a) Actual desertion,
(b) Constructive desertion, and
(c) Wilful neglect: this expression is

used both under the Special Marriage Act, 1954 and the Hindu Marriage Act, 1955 and in some cases, it has been considered part of constructive desertion.

The main elements of desertion are:

(a) the fact of separation (factum deserdendi), and
(b) the intention to desert (animus deserdendi).

The further elements are:

(i) without any reasonable cause,
(ii) without the consent of the other party or against the wishes.

Further, to examine of the elements of desertion, the following two preliminary observations are necessary to note with a view to clearly comprehending the legal concept of desertion:

(A) Until an action is brought desertion remains an inchoate offence, that is to say, it can be terminated by the party in desertion by either resuming cohabitation or expressing an unequivocal intention to resume cohabitation.

(B) Although fact of separation is an essential element of desertion, it does not mean that the party who leaves the matrimonial home is necessarily the deserter. It may be that a party who stays behind may by conduct or act on his part had made it intolerable for the other spouse to stay on in the matrimonial home. This aspect of desertion is called constructive desertion."

(Re: Law of Marriage & Divorce, Fourth Edition by Paras Diwan particularly page 410 & 411).

8.4 Matrimonial matters are matters of delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with the spouse. The relationship has to conform to the social norms as well.

The matrimonial conduct has now come to be governed by statute framed, keeping in view such norms and changed social order. It is sought to be controlled in the interest of the individuals as well as in broader perspective, for regulating matrimonial norms for making of a well knit, healthy and not a disturbed and porous society. Institution of marriage occupies an important place and role to play in the society, in general. (Re: judgment of the Hon'ble Supreme Court in the case of Chetan Dass vs. Kamla Devi 2001 AIR SCW 1660 - para 14).

9. In this case marriage took place in 1982 and since March 1984 husband and wife have not stayed together whereas petition filed in 1992, the learned trial court has given the judgment on 6th November, 1998, and thereafter the appeal has been filed and till today both appellant and respondent have not stayed together husband and wife. In view of this peculiar facts and circumstances of the case, according to me, during this period so many period lapse since the husband and wife stayed together. In these circumstances it can be reasonably inferred that the marriage between the parties have broken down completely without any fault on the part of the appellant husband. In view of the same, the appellant prayer for dissolution of marriage should be granted and the judgment and decree of the trial court is quashed and set aside. I have also relied upon the recent judgment of the Hon'ble Apex Court in the case of Praveen Mehta vs. Inderjit Mehta (supra) in this behalf.

10. As regards other contention, learned advocate for the appellant stated that the marriage is completely broken down irretrievably and the divorce may be granted in this behalf. I have already decided to grant divorce on the ground of desertion, therefore, I do not expressed any opinion on the said contention of the learned advocate for the appellant.

11. In view of the same the appeal is allowed. The impugned judgment and decree passed by the trial court is quashed and set aside. The appellant is entitled to a decree of divorce.

11.1 I have considered the entire aspect of the matter and there is no useful purpose to have kept the parties as husband and wife particularly from 1984 both husband and wife have not stayed together. This Court has therefore no alternative but to pass the order for divorce to see that both people can be free to have there own houses in this behalf. The appellant-petitioner is entitled to grant decree of divorce on ground of desertion. The first appeal is therefore allowed with no

order as to costs. The judgment and decree passed by the trial court on 6th November, 1988, in H.M.P.No.262/92 is quashed and set aside.

12. Before I part with the judgment, I would like to quote following observations:

> "No two human beings can be forced to live together, whether by pressure of society or by a writ of court, this fact we will have to accept. Marriage entail living together and two persons can live together only if their hearts and minds meet.
>
> [As quoted from Article "Grounds of Divorce : Do they need a second look" published in AIR 1999 Journal p.164]

13. Mr.Pancholi, learned advocate for the respondent prays that the judgment and decree may not be implemented and executed for some time. At his request there will be stay of the judgment and decree of this Court till 9th December, 2002.

(K.M. Mehta, J.)

syed/